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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

AMAX METALS RECOVERY, INC.,

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 10, 1993

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QUESTION PRESENTED

The collective bargaining agreement provided that the Company was, except as expressly restricted by the provisions of the agreement, to have all the rights it would have had if there were no agreement, that an arbitrator was to interpret and apply the express provisions of the agreement, and that he was to have no power to add to, modify or amend any part of the agreement. During the contract respondent initiated a grievance to require petitioner to continue making payments for which the agreement did not provide. The arbitrator said they were "a working condition on which the Agreement is silent". He held he nevertheless had the authority to require petitioner to continue making the payments. The United States Court of Appeals for the Fifth Circuit held he had not exceeded his authority. The question presented for review is:

Whether, when the collective bargaining agreement provides that the employer shall, except to the extent expressly restricted by the provisions of the collective bargaining agreement, have all the powers it would have had if there were no such agreement, that an arbitrator's authority is to interpret and apply the express provisions of the collective bargaining agreement and that he has no power to add to, modify or amend them, an arbitrator is acting within the scope of his authority when, without interpreting any provision of the agreement, he requires the employer to continue making payments with regard to which the agreement is silent?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below were petitioner Amax Metals Recovery, Inc. and respondent United Steelworkers of America.

The parent company of petitioner is Amax, Inc. There is no subsidiary of petitioner.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Amax Metals Recovery, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on May 10, 1993.

OPINIONS BELOW

The opinion of the Fifth Circuit is not reported. It is reprinted in the appendix hereto at pages A-1 through A-9.

The opinion of the United States District Court for the Eastern District of Louisiana (Beer, J.) is not reported. It is reprinted in the appendix hereto at pages A-12 through A-15.

JURISDICTION

The judgment of the Fifth Circuit was entered on May 10, 1993. A petition for rehearing and a suggestion for rehearing *en banc* were denied on June 18, 1993. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. Sec. 185(a).

STATEMENT OF THE CASE

There are special and important reasons for granting a writ of certiorari in this case.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law in a way that conflicts with decisions of the Supreme Court of the United States. (Supreme Court Rule 10.1(c).) If arbitrators are held to have the authority, despite express provisions of a collective bargaining agreement that they do not have that authority, to require a party to the agreement, whether it be the employer or the union, to observe requirements which have nothing to do with the agreement, both employers and unions will, with consequent impact on the already overloaded federal courts, be less likely to agree upon arbitration as the means of resolving their differences over the interpretation of their agreements. The decision of the Fifth Circuit conflicts with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and other precedents of this Court which have made it clear that parties to a collective bargaining agreement, by the very same language used for the purpose here, confine arbitrators to the interpretation and application of the agreement and deny them the authority to impose, without interpreting any provision of the agreement, upon either party to the agreement an obligation with respect to which the agreement is silent.

The decision of the Fifth Circuit is also in conflict with decisions of the United States Courts of Appeals for the Second, Fourth, Sixth, Seventh and Tenth Circuits

which are discussed below. (Supreme Court Rule 10.1(a)(i).)

THE FACTS AND THE PROCEEDINGS BELOW

The facts material to consideration of the question presented are undisputed. They are also plain and simple. They are set out in the affidavit of Roland E. Des Roches ("Des Roches"; A-18) sworn to March 4, 1992, filed in support of petitioner's motion for summary judgment in the District Court, and they were uncontroverted on the record. Des Roches has been Manager of Industrial Relations at the facility in question since operations began there in 1973 (Des Roches, paragraph 3; A-18). The material facts also appear on the face of the arbitrator's Opinion and Award ("Opinion and Award"; A-27), dated October 28, 1991, which petitioner sought to have vacated in the District Court.

Petitioner conducts a metals reclaim business in Braithwaite, Louisiana, producing goods for shipment in interstate commerce. Petitioner and a predecessor subsidiary of Amax, Inc. have conducted operations at the aforesaid Braithwaite facility since 1973 (Des Roches, paragraphs 2, 3; A-18).

In 1974, respondent was certified as the collective bargaining representative of the production and maintenance employees at the facility. The first collective bargaining agreement with respondent was made in 1975.

There has since been a series of successor collective bargaining agreements. (*id.*, paragraph 4; A-19). The collective bargaining agreement in question here was dated September 1, 1990 (A-21), and expired at the end of August 31, 1993 (A-25). It provided that "the Company shall have all the rights it would have had were this Agreement not in effect; provided that any exercise of these rights *expressly* restricted by the provisions of this Agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement" (Article IV; A-21; emphasis added), and the grievance procedure provided that "the Arbitrator shall interpret and apply the *express* provisions of this Agreement to the facts of the particular grievance involved, and shall have *no power* to add to, modify or amend any part of this Agreement." (Article VII, Section 2, Fourth Step, fourth sentence; A-23; emphasis added).

That wording was proposed by petitioner in the negotiations leading up to the very first contract between it and respondent in 1975. In those negotiations respondent initially noted that the wording was "unusual." Petitioner responded that it wanted to avoid any obligations arising out of past practice. Respondent then said it was not interested in protecting past practices or taking away petitioner's right to manage and agreed to the language. The arbitrator's summary of the testimony to that effect (Opinion and Award, pages 4, 5; A-31, 32) and Des Roches's confirmation, in his affidavit sworn to March 4, 1992, that what the arbitrator had to say in that respect was correct (Des Roches, paragraph 8; A-19, 20) were uncontroverted in the District Court.

> [T]he term "past practices" arose in the 1975 contract negotiations for the parties' initial Agreement. . . . [M]anagement had proposed the wording of the management rights and Step Four provisions, which the Union accepted and which has not been changed in the succeeding negotiations. . . . [M]anagement's objectives with regard to those proposals were to insure that the Company would not be bound by any past practices and that only the express contract provisions would limit the Company's reserved rights. . . . [T]he Union's chief negotiator initially noted the unusual nature of the Company's management rights proposal, and management responded that it wanted to avoid any obligations arising out of past practices. . . . [T]he Union spokesman then indicated that the Union was not interested in protecting past practices or taking away the Company's right to manage.

(Opinion and Award, pages 4, 5; A-31.) The wording went into the contract at that point and has been renewed, unchanged and, until this grievance, uncircumvented in every contract since. (Opinion and Award, pages 4, 5, 7; A-31, 32, 34; Des Roches, paragraph 8; A-19, 20.)

During the contract respondent initiated a grievance requesting enforcement of a "practice" regarding pay for certain unworked meal periods. Petitioner denied the grievance and respondent requested arbitration. Jerome H. Ross was designated as the arbitrator. A hearing in the arbitration took place on October 4, 1991. (Des Roches, paragraphs 5, 6; A-19.)

Mr. Ross later issued the Opinion and Award, saying that "the Union asserts a past practice for the purpose of establishing a working condition on which the Agreement is silent" (Opinion and Award, page 7; A-33) and that the "issues presented by this grievance are: Whether a past practice is enforceable under the parties' Agreement; and if so, whether a past practice was established" (*id.*, page 3; A-29), and then ordering that the employees in question "shall be made whole in accordance with the past practice" and that "the Company shall reinstate the practice." (*id.*, page 11; A-36.)

Petitioner's complaint in the District Court sought to vacate the arbitrator's award on the grounds he had exceeded his authority and had not drawn anything, let alone the essence of his award, from the collective bargaining agreement. The District Court entered a final judgment (A-16) dismissing the complaint and enforcing the award, because in its opinion the arbitrator's ruling, right or wrong, as to his own authority was entitled to judicial deference. On appeal, the Fifth Circuit affirmed the judgment of the District Court, saying that the arbitrator did have authority to do what he did and affording judicial deference, again whether right or wrong, to his having interpreted as somehow inapplicable the provisions of the collective bargaining agreement that rights "*expressly* restricted by the provisions of this Agreement" were to be subject to the grievance procedure, that the arbitrator was to "interpret and apply the *express* provisions of this Agreement", and that he was to have "*no power*" to do anything else.

THE REASONS FOR ALLOWANCE OF THE WRIT

I. The Fifth Circuit Has Decided An Important Question of Federal Law In A Way That Conflicts With Decisions of the Supreme Court.

Why this case raises an important federal question (Supreme Court Rule 10.1(c)) has already been set out above. We will here deal in greater detail than above with why the decision of the Fifth Circuit with regard to that question is in conflict with applicable decisions of this Court.

While a court acts properly in deferring to an arbitrator's decision on the merits of a question other than his own authority, his decision as to his own authority is not, as the Fifth Circuit recognized (A-5), entitled to deference and must be decided by the court de novo. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

The question at issue here is one of the arbitrator's authority. The question is whether the parties to the collective bargaining agreement here had empowered an arbitrator to enforce, as if it were part of the collective bargaining agreement, a past practice having nothing to do with the interpretation of any provision of that agreement. But what the Fifth Circuit in fact reviewed *de novo* was only whether the dispute was grievable (A-5), not whether it was arbitrable. That the parties have agreed to discuss something in the procedure preceding arbitration is an entirely different question from whether, if the discussions fail, they have empowered a third party to decide it for them.

The grievance alleged violation of a past practice, not of any provision of the contract. The arbitrator agreed the contract was "silent" as to the alleged practice. He put the question before him as whether, in those circumstances, "a past practice is enforceable under the parties' Agreement" (Opinion and Award, page 3; A-29), *i.e.* whether he had the power under the contract between the parties to enforce the practice. He held that he did have the authority to enforce a practice arising after the date of the first collective bargaining agreement between the parties in 1975, and the district court erroneously "conducted a deferential review" of his findings as to that question (A-13, 14) instead of the *de novo* review which this Court requires when the issue is one of the arbitrator's authority rather than the merits of a question as to which there is no dispute he has the authority to decide. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. at 649. Like the District Court, the Fifth Circuit erred in treating as a matter of contract interpretation, as to which the arbitrator's ruling is entitled to judicial deference, the agreement's express limitations on his power, as to which his ruling is not entitled to deference, and then failing to vacate the arbitrator's award on the theory that, "Although we might have interpreted the contract differently" (A-6), it is entitled to deference rather than *de novo* review whether it is correct (A-8).

When one examines the question other than on a deferential basis, as the District Court professedly did not and as the Fifth Circuit in fact did not, it will be seen that the arbitrator did not have the authority he said he did, that the Fifth Circuit's decision is in conflict with the precedents of this Court, and that a writ of certiorari

should therefore be granted, the Fifth Circuit's decision should be reversed, and the arbitrator's award should be set aside.

The Fifth Circuit looked *de novo* only at whether the dispute was a grievance within the meaning of the contract. That court's observation that a "grievance" is defined by the collective bargaining agreement as "any disagreement between the Company and the Union or any of the employees" means that a practice having nothing at all to do with the interpretation or application of the contract falls "squarely in the subject matter jurisdiction of the arbitrator" (A-5) misses the question here. The question here is not whether there was a grievance, but whether the grievance was arbitrable. To decide that, one must look at what the parties had to say about the authority of an arbitrator. Whether the moon is made of green cheese is, if the parties disagree about it, a grievance within the meaning of the contract, but that does not mean that the arbitrator has the authority to decide the question.

The first step in examining *de novo* what authority the arbitrator was intended to have and was intended not to have is to look at the parties' agreement on that subject. What they said was that "the Company shall have all the rights it would have had were this Agreement not in effect; provided that any exercise of these rights *expressly restricted* by the provisions of this Agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement," and that "the arbitrator shall interpret and apply the *express provisions* of this Agreement to the facts of the particular grievance involved, and shall have *no power* to add to, modify or

amend any part of this Agreement." (A-23, emphasis supplied). The authority it was agreed the arbitrator would have was solely to interpret and apply the *express provisions* of the collective bargaining agreement. He was to have *no power* to enforce anything other than those *express provisions*. That is precisely what the parties agreed on. There was no exception in favor of other matters, whether arising before or after 1975.

The next step is to take a look at how the parties got to that language. That is set out in the arbitrator's opinion (Opinion and Award, pages 4, 5; A-31). While it is represented there as petitioner's testimony, there is no suggestion that anyone contradicted it at the arbitration hearing, and it was confirmed in the affidavit evidence before the District Court and again contradicted by no one. (Des Roches, paragraph 8; A-19, 20). The wording in question was proposed for inclusion in the contract. Respondent observed it was "unusual." Petitioner responded it did not want any obligations on account of past practices, and respondent said it "was not interested in protecting past practices or taking away the Company's right to manage." The language was agreed to across the table, again without any distinction in terms of before or after 1975, and it went into the contract, where it has remained unchanged ever since.

There are other words, of course, which could have been used to say that an arbitrator was to have no power to do other than stick to interpreting the express provision of the contract and that he was to have no power to impose on either party obligations arising from things that have nothing to do with those express provisions. There are all kinds of ways of saying anything, but it

happens that the words the parties chose to use for the purpose were those recommended by this Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. at 579. There the Court quoted with approval the observation that, while "it is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded," it becomes so if "they [the parties] stated a contrary rule in plain words." It is submitted there are no plainer words with which the parties to a collective bargaining agreement can express a contrary rule, that is the rule referred to in *Warrior & Gulf* that a contract "is simply a document by which the union and employees have imposed upon management limited, *express* restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded," than that, as the parties said here, "the Company shall have all the rights it would have had were this Agreement not in effect," except to the extent "*expressly* restricted by the provisions of this Agreement," and that "the arbitrator shall interpret and apply the *express provisions* of the contract to the facts of the particular grievance involved, and shall have *no power* to add to, modify or amend any part of this Agreement." (Articles IV and VII, Section 2, Fourth Step, fourth sentence; A-23, emphasis added). Respondent had reason to know

exactly what it and petitioner agreed to across the table and in the contract. *Warrior & Gulf* was respondent's case.

In erroneously deferring to the arbitrator's decision regarding his own authority, the District Court and the Fifth Circuit brushed aside, as having no significance, the parties' agreement that the arbitrator was to interpret and apply the express provisions of the contract and *only* the express provisions of the contract. Respondent did not think it was insignificant. Respondent recognized it was "unusual" (Opinion and Award, page 5, A-31; Des Roches, paragraph 8; A-19, 20). It was just what this Court had recommended when parties do not intend that an arbitrator have authority to enforce something other than the express restrictions of a collective bargaining agreement, and Respondent agreed to it with eyes wide open.

The Fifth Circuit cited (A-7) cases for the proposition that a no-modification clause does not limit the arbitrator to the express terms of the agreement. But, of course, everything depends on what the clause says. If, particularly when on top of this contract's recital that the employer shall, except to the extent *expressly restricted* by the provisions of the agreement, have all the rights it would have had if there were no agreement, the contract says, as this one does, that the arbitrator shall interpret the *express provisions* of the agreement and shall have no power to add to them, then it does limit, as this Court in *Warrior & Gulf* said it should, the arbitrator to exactly that. While such a clause does not prevent an arbitrator from looking to practice or otherwise looking outside the agreement as an aid to doing what the contract authorizes him to do, namely interpreting and applying an express provision of the agreement, it does prohibit him from

enforcing, independently of any provision of the contract, something that is not a provision of the contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

While the cases are legion in which arbitrators have been backed up in looking to practice outside the contract as an aid to *interpreting* a provision of a contract, we are not aware of a case, other than this very case now before this Court, in which a court, in the absence of a clause specifically incorporating a practice and given the presence of an authority clause like the one here, has affirmed an arbitrator when, while admittedly not purporting to interpret any provision of the contract, he has enforced a practice as if it were a provision of the contract.

The Fifth Circuit's citation (A-7, 8) of *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), does not support its conclusion. The court quotes the statement that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision" (484 U.S. at 38), and then says that,

"although we might interpret the provisions of the agreement to prohibit the inclusion of past practices, we will not supplant our interpretation for that of the arbitrator." (A-8) The point is that the arbitrator's decision with regard to his own authority is not entitled to deference, and a *de novo* review shows the arbitrator in this case to have gone beyond his authority when, without even arguably purporting to construe or apply any provision of the contract, he enforced a practice that had nothing to do with the contract.

Misco is not the only case in which the Supreme Court has said an arbitrator must, if it is to be expected that his award will be confirmed, act within the scope of his authority to decide only claims which are on their face governed by the contract and not enforce claims, like the claim here, based on agreements or practices outside the collective bargaining agreement. Thus, in *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960), this Court said that even "when the parties have agreed to submit all questions of contract interpretation to the arbitrator," the duty of the courts is "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." Thus, too, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597-98 (1960), the Supreme Court said:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence

> from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. . . . The Court of Appeals' opinion refusing to enforce . . . portions of the award was not based upon any finding that *the arbitrator did not premise his award on his construction of the contract*. It merely disagreed with the arbitrator's construction of it. (Emphasis added.)

In this case the grievance did not, regarding its merits, invoke any provision of the collective bargaining agreement; the arbitrator was not called upon, in connection with the merits of the grievance, to construe any provision of the agreement; and the arbitrator enforced a practice that had nothing to do with the contract. If the Fifth Circuit in this case had, because of that, declined to enforce the award, it would have acted correctly, consistently with Supreme Court precedent. As it is, the *per curiam* opinion is in conflict with that precedent.

II. The Decision of the Fifth Circuit Is In Conflict With Decisions of Other Courts of Appeals.

We here call to this Court's attention decisions, many of them quite recent, of the United States Courts of Appeals for the Second, Fourth, Sixth, Seventh and Tenth Circuits with which the decision of the Fifth Circuit is in conflict.

The Second Circuit.

In *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63 (2d Cir. 1990),

the collective bargaining agreement provided that an arbitrator had no authority to add to, subtract from or in any way modify its terms. The grievance in question demanded a higher wage rate for some employees than that which the employer was paying. Although the agreement was silent with regard to any such requirement, the arbitrator granted the grievance on the grounds that other employees were being paid the higher rate of pay. The Second Circuit reversed and remanded, with instructions to the district court to vacate the award. In doing so, the Second Circuit said:

> "An arbitrator's power is both derived from, and limited by, the collective bargaining agreement." . . . He is "confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597, 80 S.Ct. at 1361. The "zipper clause" in Leed's collective bargaining agreement which denies the arbitrator the right to "add to, subtract from or in any way modify" its terms, is a pragmatic restatement of the above holdings. Its purpose is "to make the written contract the exclusive statement of the parties' rights and obligations." . . .
>
> Although courts usually are reluctant to prohibit arbitration before it takes place because of the difficulty in predicting what the arbitrator will do, . . . this uncertainty is eliminated once the arbitrator has made his award. If the reviewing court then determines that the arbitrator has derived his authority from sources outside the collective bargaining agreement, his award cannot stand. [Citations.]

> The arbitrator in the instant case violated this well-established rule when, in violation of both the law and the collective bargaining agreement, he ordered that the bargained for wages of the four grievants should be increased. His decision therefore cannot stand.
>
> Reversed and remanded to the district court with instructions to vacate the award.

916 F.2d at 66-67.

The Fourth Circuit.

In *Monongahela Power Co. v. International Brotherhood of Electrical Workers*, 566 F.2d 1196 (4th Cir. 1976), the collective bargaining agreement provided that the arbitrator "shall have no authority to add to, detract from or alter its express terms" and that the employer had the unqualified right to discharge or discipline employees who violated the agreement's no-strike clause. The union grieved the suspension of employees who had violated the no-strike clause. The arbitrator modified the suspensions. Because the arbitrator had gone beyond his "province" and altered the agreement to accord with "his own brand of industrial justice," the Fourth Circuit, citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S at 597, reversed the district court's judgment sustaining the award and directed the district court to set aside the modification of the suspensions.

The Sixth Circuit.

In *International Assn. of Machinists & Aerospace Workers, Dist. 154, Local Lodge No. 2770 v. Lourdes Hosp.*,

Inc., 958 F.2d 154 (6th Cir. 1992), the arbitrator imposed upon the employer, as the arbitrator in the instant case has imposed upon petitioner, a pay requirement as to which the contract was silent. The Sixth Circuit reversed the district court decision and denied enforcement of the award, saying:

> No specific provision of the bargaining agreement has been violated. . . . In essence, the arbitrator created a contract term requiring sufficient notice of all schedule change. Because no such term exists in the bargaining agreement, the arbitrator's decision exceeds his discretion and impermissibly administers his own brand of industrial justice. *United Steelworkers v. Enterprise Wheel & Car Corp*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

958 F.2d at 157.

In *International Brotherhood of Electrical Workers v. Toshiba America, Inc.*, 879 F.2d 208 (6th Cir. 1989), the Sixth Circuit was faced by a similar situation. There the arbitrator relied on an oral agreement in ordering reinstatement of employees who had participated in an illegal strike. The collective bargaining agreement provided that an arbitrator "shall have no authority to modify, amend, add to or subtract from any of the terms or conditions of this agreement." The Sixth Circuit rejected the claim that an oral agreement should supersede the collective bargaining agreement itself and affirmed the district court's having granted summary judgment denying enforcement of an award to the contrary.

In *Amanda Bent Bolt Co. v. International Union, United Auto, etc.*, 451 F.2d 1277 (6th Cir. 1971), the contract provided, "The arbitrator shall have no power to add to, subtract from or modify any of the terms of this agreement." The arbitrator, because he thought the employer's action had been "unusually harsh and severe," held, despite the absence of anything in the contract to that effect, that the employer could not discharge employees and then hire them back as new employees without seniority. Citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 for the proposition that an "award is legitimate only so long as it draws its essence from the collective bargaining agreement," the Sixth Circuit reversed the judgment of the district court affirming the award and remanded with directions to set the award aside.

The Seventh Circuit.

In *Polk Brothers, Inc. v. Chicago Truck Drivers, etc.*, 973 F.2d 593 (7th Cir. 1992), the collective bargaining agreements in question both contained a provision that the arbitrator was to have "no power to add to, subtract from, modify or amend any provision of this Agreement." Because, with regard to a portion of his award, the arbitrator, "contrary to express contractual provisions," based his award on a source outside the contract, the Seventh Circuit affirmed the judgment of the district court vacating that part of the award.

In *Roadmaster Corp. v. Production and Maintenance Employees' Local 504, etc.*, 851 F.2d 886 (7th Cir. 1988), the collective bargaining agreement provided that the

employer retained all rights to manage the business "unless modified or restricted by a specific provision in this Agreement" and that "[t]he arbitrator shall not have the power to add or subtract from any of the terms of this Agreement."

> The arbitrator . . . based his decision not upon the parties' bargain, but rather upon his "view of the requirements of enacted legislation." Thus, he has " 'exceeded the scope of the submission' and the award will not be enforced." Gardner-Denver, 415 U.S. at 53, 94 S.Ct. at 1022 (quoting Enterprise Wheel, 363 U.S. at 597, 80 S.Ct. at 1361). The district court acted properly when it set aside this arbitration award.

851 F.2d at 889.

The Tenth Circuit.

In *International Union of Operating Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657, 660 (10th Cir. 1980), the arbitrator "added a provision not in the agreement, not bargained for, and in doing so 'violated the essence of the agreement.' " The Tenth Circuit affirmed the decision of the district court vacating the award.

CONCLUSION

For all the above reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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September 10, 1993

No. _____

In The

Supreme Court of the United States

October Term, 1993

AMAX METALS RECOVERY, INC.,

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3702
Summary Calendar

AMAX METALS RECOVERY, INC.,

Plaintiff-Appellant,

VERSUS

UNITED STEELWORKERS OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(CA 90 236 M)

(Filed May 10, 1993)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

PER CURIAM:*

This case involves an appeal from a district court's decision to enforce an arbitration award. The appellant

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* Local Rule 47.5.1 provides:
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that rule, the court has determined that this opinion should not be published.

argues that the arbitrator exceeded his authority by looking outside the parties' written agreement to resolve the issue before him. Consequently, the appellant argues that the district court erred in deferring to the arbitrators [*sic*] findings. We hold that the district court correctly deferred to the findings of the arbitrator. In so holding we affirm the district court's finding that the arbitrator did not exceed his authority when he interpreted the agreement to permit reference to past practices.

I.

Amax Metals Recovery, Inc., the appellant, and the United Steelworkers of America, the appellee, entered into a collective bargaining agreement in 1975. The agreement provides in part

> the Company shall have all the rights it would have had were this Agreement not in effect; provided that any exercise of these rights expressly restricted by the provisions of this Agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement. . . .
>
> The Arbitrator shall interpret and apply the express provisions of this Agreement to the facts of the particular grievance involved, and shall have no power to add to, modify or amend any part of this Agreement.[1]

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[1] Record Excerpts, Tab 8, p.4. The second paragraph of the language quoted is hereinafter referred to as "the no modification clause".

According to Amax, during the negotiations which resulted in this agreement, the parties discussed the meaning of the term "express provisions". Allegedly, they agreed that this term limited the parties [*sic*] rights to the terms included in the agreement as drafted, eliminating the union's right to assert past practices against Amax.[2]

When a dispute arose concerning payment for meal breaks, the parties submitted the grievance to arbitration. The Union claimed that Amax was bound to continue payment for meal breaks when the employees worked overtime. Amax countered arguing that the agreement prevented the Union from asserting a past practice against it. The issue as put to the arbitrator was whether a past practice is enforceable under the parties' agreement. The arbitrator found that Amax had orally agreed to pay for these breaks in certain overtime situations. Specifically, the arbitrator found that the parties [*sic*] past practice of paying for these breaks which developed years after the written collective bargaining agreement was adopted, could serve to bind Amax under the agreement.

Interpreting the language of the written agreement as quoted above, the arbitrator found that this language did not prevent him from enforcing past practices that developed after the agreement was signed in 1975. The arbitrator stated that "[a]t most, it would be reasonable to argue that . . . the Union signed away its right to claim past practices in existence prior to the effective date of the

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[2] The arbitrator took notice of Amax's rendition of these facts yet made no factual findings on the matter.

initial agreement in 1975".[3] He continued, finding "no basis . . . to conclude that the Union agreed to prospectively forego the right to assert the existence of past practices arising during the term of the parties' agreement".[4]

Based on this interpretation of the contract language in addition to finding that a past practice had developed, the arbitrator resolved the grievance in favor of the Union. He ordered Amax to reinstate the practice of paying for the meal breaks and to pay back pay for those breaks it had denied pay. Amax appealed this decision to the Eastern District of Louisiana, and the court upheld the arbitration award. The court relied on what it characterized as well settled precedent requiring it to affirm the award. The court conducted a deferential review of the arbitrator's findings and held that the arbitrator had not erred by enforcing a past practice. Specifically, the court held that the arbitrator did not exceed his authority by doing so. Further, the court held that the "no modification" clause in the agreement did not restrict the arbitrator from interpreting the agreement to allow the enforcement of past practices.

Amax appeals the district court's holding, arguing that the district court erred in upholding the award because the arbitrator (1) had no authority to arbitrate the dispute, (2) exceeded his authority by referring to and enforcing a past practice, (3) issued an award that contradicted the express language of the agreement; and (4)

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[3] Record Excerpts, Tab 8, p.8.

[4] *Id.*

failed to draw his award from the essence of the contract. We reject these arguments and therefore affirm the decision of the district court upholding the arbitration award.

II.

Contrary to the argument made by Amax, an arbitrator's ruling is entitled to considerable deference upon judicial review.[5] When reviewing the subject matter jurisdiction of the arbitrator, however, we review de novo. We turn to this issue first.

The agreement provided for arbitration of all grievances.[6] It defines "grievance" as "any disagreement between the Company and the Union or any of the employees".[7] Under this definition, the dispute between the [*sic*] Amax and the Union over whether its employees were entitled to meal break pay constitutes a grievance. Consequently, the issue was correctly submitted to arbitration and fell squarely in the subject matter jurisdiction of the arbitrator.

We turn next to Amax's remaining arguments. Although Amax frames its argument as three separate issues, all three boil down to one basic contention. Amax contends that the language of the no modification cause clearly and unambiguously forecloses the arbitrator from

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[5] *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied* 498 U.S. 853 (1990). Amax argues for a de novo review of the arbitrator's ruling.

[6] Record Excerpts, Tab 8, p.5-6.

[7] *Id.*

including past practices in his analysis. It maintains that the arbitrator exceeded his authority as granted by the agreement by looking outside the "express" terms of the agreement. Consequently, Amax argues that the award was not drawn from the essence of the contract and is contrary to the express terms of the agreement.

The Supreme Court has long recognized the necessity of imposing only a considerably deferential review on arbitration awards.[8] The Court, however, did not prescribe this deference blindly. The award will be upheld only if it "draws its essence from the collective bargaining agreement".[9] This Court has interpreted this phrase to require that the award be "rationally inferable" in "some logical way" from the agreement.[10] Under this standard, the award in this case must be upheld. Although we might have interpreted the agreement differently, the arbitrator's interpretation is at least rationally inferable from the agreement. His conclusion that the term "express" did not preclude the inclusion of past practices is logical.

This Court has long acknowledged the arbitrator's right to look beyond the written language of collective

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[8] *The Steel Workers Trilogy, United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566-68 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 594, 599 (1960).

[9] *Steelworkers*, 363 U.S. at 597.

[10] *International Chemical Workers Union v. Day & Zimmermann, Inc.*, 791 F.2d 366, 369 (5th Cir. 1986), *cert. denied* 479 U.S. 884 (1986).

bargaining agreements when the agreement is ambiguous or silent as to a particular point.[11] As the arbitrator found, the agreement was silent as to pay for mealtime breaks. Further the agreement was silent or at best ambiguous with regards to the applicability of past practices. While Amax does not dispute this rule, it maintains that the no modification clause clearly prohibits reference to outside sources. This is not the case.

This Court has held that the existence of a no modification clause does not limit the arbitrator to the written terms of the agreement.[12] Amax attempts to distinguish this holding on the grounds that the arbitrator in that case looked outside the agreement for guidance in interpreting the terms of the written agreement itself, whereas here, Amax argues, the arbitrator looked outside the agreement to create a totally new obligation. Amax fails to recognize that the arbitrator did not look outside the agreement to resolve the issue of whether past practices could be asserted against Amax – he looked to the agreement itself and concluded that the agreement *as written* did not preclude reference to past practices. Surely the interpretation of the express agreement was within the authority delegated to the arbitrator.

In *United Paperworkers Int'l Union v. Misco*,[13] the Supreme Court held that the arbitrator may not ignore the plain language of the contract. Yet, in *Misco*, the Court

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[11] *Manville Forest Products, Corp. v. United Paperworkers Intern. Union*, 831 F.2d 72, 75 (5th Cir. 1987); *Delta Queen*, 889 F.2d at 602.

[12] *Manville*, 831 F.2d at 76; *Steelworkers*, 363 U.S. at 578-83.

[13] 484 U.S. 29 (1987).

further held that a court could not reject an award on the ground that the arbitrator misread the contract. The Court stated "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of this authority, that a court is convinced the arbitrator committed serious error does not suffice to overturn his decision".[14] Thus, although we might interpret the provisions of the agreement to prohibit the inclusion of past practices, we will not supplant our interpretation of the contract for that of the arbitrator.

One final point in Amax's argument must also be addressed. Amax relies on a line of cases in which this Court reversed several arbitration awards on the grounds that the arbitrator exceeded his authority and granted an award contrary to the express terms of the agreement.[15] These cases uniformly address an arbitrator's analysis of whether an employee was discharged for just cause. In each of the cases, the agreement clearly limited the arbitrator's authority. These cases are not grounded on boiler-plate no modification clauses, rather they are grounded on express limitations in the arbitrator's authority. For example, in *Delta Queen*, the agreement provided that if the arbitrator found just cause for an employee's discharge, his authority ended and the

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[14] *Id.* at 38.

[15] *Delta Queen*, 889 F.2d 599; *E.I. DuPont de Nemours and Co. v. Local 900 of International Chemical Workers Union AFL-CIO*, 968 F.2d 456 (5th Cir. 1992); *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 922 F.2d 256 (5th Cir. 1991), *cert. denied* ___ U.S. ___, 112 S.Ct. 297 (1991); *see also International Brotherhood of Electrical Workers. [sic] Local 429 v. Toshiba America, Inc.*, 879 F.2d 208 (6th Cir. 1989).

responsibility for discipline shifted to the employer. In spite of this language, the arbitrator reinstated an employee after specifically finding that he had been discharged for just cause. This Court affirmed the district court's decision to vacate the award based on the fact that the arbitrator had clearly gone beyond his authority in fashioning the award.

The present case does not resemble this line of cases. Here the arbitrator clearly had the authority to interpret the collective bargaining agreement. This is, in fact, just what he did. In addition, his award does not contradict the express terms of the agreement. The agreement nowhere provides that past practices will not be asserted against Amax. Although this may in fact be what Amax attempted to attain in bargaining for the language in the agreement, it did not so clearly state it as to require this Court to reverse the arbitrator's adverse finding. Merely restricting the arbitrator to interpreting the "express" terms of the agreement does not require that the arbitrator so interpret those provisions as excluding past practices that developed after the agreement was signed.

III.

For the foregoing reasons, we AFFIRM the district court's decision to uphold the arbitration award.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3702

AMAX METALS RECOVERY, INC.,

Plaintiff-Appellant,

versus

UNITED STEELWORKERS OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 05/10/93, 5 Cir., ___, ___ F.2d ___)

(Filed June 18, 1933)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are

in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

MINUTE ENTRY
BEER, J.
APRIL 9, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

AMAX METALS RECOVERY, INC. CIVIL ACTION

VERSUS NO. 92-236

UNITED STEELWORKERS OF AMERICA SECTION M
(Filed Apr. 22, 1992)

Plaintiff's Motion for Summary Judgment Vacating the Arbitrator's Award was heard on April 8, 1992. For the reasons that follow, plaintiff's motion is denied.

I. Background

Plaintiff and defendant entered a collective bargaining agreement (Agreement) in 1975. The Agreement provides that "the Company shall have all the rights it would have had were this Agreement not in effect; provided that any exercise of these rights expressly restricted by the provisions of this agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement." The Agreement's grievance procedure provides for arbitration and states that "the Arbitrator shall interpret and apply the express provisions of this Agreement to the facts of the particular grievance involved, and shall have no power to add to, modify or amend any part of this Agreement."

This motion stems from plaintiff's unilateral decision to terminate a practice of providing paid lunches to employees in the Material Handling Department (MHD)

who had to work 10 or more hours in a day. Said practice was not established by the parties' Agreement. Rather, it developed out of a June 1986 conversation between union official Joel Fiegenschue and company supervisor Bill McClure. Adoption of the practice resulted in the consistent and uniform payment of lunches, with few exceptions, over the next 3.5 years. On January 29, 1990, plaintiff terminated the practice to help cut costs.

Defendant union filed a grievance on February 5, 1990, challenging plaintiff's termination of the paid lunch program. Plaintiff denied the grievance, causing defendant to request arbitration. An arbitrator thereafter sustained the grievance, finding the paid lunch program had ripened into an enforceable "past practice" among the parties. The arbitrator ordered that the practice be reinstated, and that all qualifying MHD employees be paid for the lunch periods for which they had not been paid since plaintiff's decision to terminate the practice. Plaintiff herein seeks to vacate the arbitrator's award.

II. Law and Analysis

Plaintiff's motion is hereby denied. An arbitrator's ruling receives considerable deference upon judicial review, and the arbitrator herein did nothing to warrant the negation of this deference.

An arbitrator's ruling is entitled to considerable deference upon judicial review. Judicial review of an arbitrator's ruling "is extremely limited," *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, 111 S.Ct. 148 (1990),

such that "[t]he federal courts will defer to the arbitrators' resolution of the dispute whenever possible." *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2799 (1991). *See also Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990) ("Judicial review of an arbitrator's award is extraordinarily narrow and this Court should defer to the arbitrator's decision when possible.").

Regarding an arbitrator's method of analysis, it is clear that collective bargaining agreements differ from traditional contracts, and that arbitrators are not bound to traditional contract principles when interpreting such agreements. The collective bargaining agreement "is more than a contract. . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S 574, 578-83 (1960). Because collective bargaining agreements are not traditional contracts, "this Circuit and others have refused to apply contract-law concepts . . . to [such] agreements." *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72, 75 (5th Cir. 1987) (citations omitted). Thus, "the arbitrator may look outside the written contract to past practice when the contract is silent on a question." *Id.* (citations omitted). The resort to past practices is not prohibited merely because the agreement contains a "no modification" clause such as that contained in the Agreement herein at issue. *See id.*

United Steelworkers and *Manville* indicate that the current arbitrator's methods and conclusions survive the

limited judicial scrutiny to which they are subject. The arbitrator addressed a working condition on which the Agreement was silent. He interpreted the Agreement as only prohibiting reliance on those past practices which had emerged prior to the Agreement's enactment, and thereafter concluded that an enforceable past practice had developed in the years following same. *Manville* and the cases cited therein confirm the legitimacy of his reliance on a past practice to resolve the parties' dispute. Regarding the arbitrator's specific conclusions, "it is the arbitrator's view of the facts and of the meaning of the contract that [the parties] have agreed to accept." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). The court has been presented with no reason to negate the deference properly afforded the arbitrator's ruling. Accordingly, plaintiff's motion to vacate the arbitrator's award must be denied.

III. Conclusion

It is hereby ADJUDGED, ORDERED and DECREED that plaintiff's motion for summary judgment vacating the arbitrator's award is DENIED.

/s/ Peter Beer
Peter Beer
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

AMAX METAL [*sic*] RECOVERY, INC.	*	CIVIL ACTION NO. 92-236
VERSUS	*	SECTION "M"
UNITED STEEL [*sic*] WORKERS OF AMERICA	*	

****

JUDGMENT

(Filed July 21, 1992)

This action came on for hearing on motions for summary judgment before the Court, Honorable Peter Beer, District Judge, presiding, and the issues having been duly heard and a decision having been clearly rendered;

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's motion for summary judgment vacating the October 28, 1991 decision and aware [*sic*] of Arbitrator Jerome H. Ross is **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that the motion of defendant to enforce the October 28, 1991 decision and award of Arbitrator Jerome H. Ross is GRANTED.

IT IS FINALLY ORDERED AS [*sic*] **ADJUDGED** that the October 28, 1991 decision and award of Arbitrator Jerome H. Ross is **ENFORCED**; that plaintiff's action is dismissed; that defendant's counterclaim is **GRANTED**; each party to pay their own costs.

New Orleans, Louisiana, this the 21st day of July, 1992.

/s/ Peter Beer
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

****

AMAX METALS RECOVERY, INC. Plaintiff	*	CIVIL ACTION NO. 92-236
VERSUS	*	SECTION "M"
UNITED STEELWORKERS OF AMERICA Defendant	*	JUDGE MAGISTRATE

****

AFFIDAVIT IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BEFORE ME, the undersigned Notary Public, personally came and appeared ROLAND E. DES ROCHES, who being duly sworn, did depose and say:

1. I am employed by Amax Metals Recovery, Inc., Plaintiff in this action. My title is Manager of Industrial Relations. I am making this affidavit of my personal knowledge and in support of Plaintiff's Motion for Summary Judgment.

2. Plaintiff conducts a metals reclaim business in Braithwaite, Louisiana, producing goods for shipment in interstate commerce.

3. Plaintiff is a subsidiary of Amax, Inc. Plaintiff and a predecessor subsidiary of Amax, Inc., have conducted operations at the aforesaid Braithwaite facility since 1973. I was hired there in 1973 and have been Manager of Industrial Relations there ever since.

4. In 1974 the defendant in this action was certified as the collective bargaining representative of the production and maintenance employees at the facility. The first collective bargaining agreement with defendant was made in 1975. I was present at the negotiations leading up to the making of that agreement. There has since been a series of successor collective bargaining agreements. I have participated in the negotiations leading up to each of those agreements. The present collective bargaining agreement is dated September 1, 1990 and expires at the end of August 31, 1993. A copy of that contract is annexed hereto as Exhibit A. My duties have included the administration of those contracts.

5. During the current contract defendant initiated a grievance. Plaintiff denied the grievance and defendant requested arbitration. Jerome H. Ross was designated as the arbitrator.

6. A hearing in the arbitration, at which I testified for plaintiff, took place on October 4, 1991.

7. Mr. Ross later issued his Opinion and Award dated October 28, 1991. A copy is attached hereto as Exhibit B.

8. On pages 4 and 5 of his Opinion and Award, Mr. Ross refers to my testimony at the hearing regarding the negotiations leading up to the first contract between plaintiff and defendant in 1975 and, in particular, regarding the parts of the contract which limit an arbitrator's authority to its express provisions. What he says about my testimony in the paragraph beginning at the bottom of page 4 and ending in the middle of page 5 of his

Opinion and Award is correct. That testimony was also correct and was not challenged by anyone.

9. In another arbitration between plaintiff and defendant under the same contract, the one dated September 1, 1990, the arbitrator, Mr. James P. O'Grady, issued a decision and award dated December 2, 1991. A copy is attached hereto as Exhibit C.

/s/ Roland E. Des Roches
Roland E. Des Roches

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 4TH DAY
OF MARCH, 1992.

Pauline A. Hebert
NOTARY PUBLIC

AGREEMENT

AMAX METALS RECOVERY, INC.
and
UNITED STEELWORKERS
OF AMERICA AFL-CIO

ON BEHALF OF
LOCAL 8373

September 1, 1990

* * *

ARTICLE IV

MANAGEMENT RIGHTS

The management and operation of the plant and direction of the working force, including but not limited to the right to hire, promote, transfer, demote, layoff and discipline employees for proper cause, shall be vested exclusively in the Company, and the Company shall have all the rights it would have had were this Agreement not in effect: provided that any exercise of these rights expressly restricted by the provisions of this Agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement.

* * *

ARTICLE VII

GRIEVANCE PROCEDURE

1. A grievance is any disagreement between the Company and the Union or any of the employees.

2. The following procedures are established for the processing and settlement of grievances against the Company:

First Step. Any grievance should normally be raised and discussed informally between the employee, the employee's immediate supervisor, and, if the employee desires, the employee's Union Grievance Committeeman. The grievance shall be answered within one day, excluding the employee's day(s) off.

Second Step. If the grievance has not meanwhile been satisfactorily settled it may, if done within the ten days, excluding Saturdays, Sundays, and holidays, following the occurrence of the facts giving rise to the grievance, be presented in writing by the Union Grievance Committeemen [*sic*] to the department head for discussion between the employee, the department head, the employee's Union Grievance Committeeman and the Chairman of the Union Grievance Committee. The grievance shall be heard within five days after being presented to the department head, excluding Saturdays, Sundays and holidays. The grievance shall be dated and signed by the employee when presented in the Second Step and shall state the facts given rise to the grievance and the remedy requested. The grievance shall be answered in writing within three days, excluding Saturdays, Sundays and holidays.

Third Step. If the grievance has not been meanwhile answered satisfactorily to the Union, it may, if done within five days following the Second Step answer be appealed in writing by the Chairman of the Union Grievance Committee to the Plant Manager or his designated

representative for discussion between the Chairman of the Union Grievance-Committee, not more than two Union Grievance Committeemen, at the Union's option the aggrieved, the Plant Manager or the Plant Manager's designated representative and, the Union District Director or his designated representative. The hearing shall be held within ten days, excluding Saturdays, Sundays and holidays, after the Union files its appeal to the Plant Manager or his designated representative. The grievance answer shall be rendered and the reasons therefore, in writing within ten days excluding Saturdays, Sundays and holidays after the hearing.

Fourth Step. If the grievance has not meanwhile been answered satisfactorily to the Union or otherwise adjusted, the Union Staff representative may, if done within twenty-five days following presentation of the grievance to the Plant Manager in the Third Step, by notice in writing signed by the Union Staff representative to the Plant Manager, refer the grievance to arbitration. A joint request will be made to the Federal Mediation and Conciliation Service for a panel or panels of arbitrators from which the parties will select an arbitrator to hear the case. Grievances shall be arbitrated separately unless otherwise agreed in writing with regard to particular cases. The arbitrator shall interpret and apply the express provisions of this Agreement to the facts of the particular grievance involved, and shall have no power to add to, modify or amend any part of this Agreement. The decision shall be signed and delivered in writing to both parties within thirty days after the close of the arbitration hearing. The Company and the Union shall each be

responsible for any fee and expenses payable to the arbitrator and each will pay one-half of any fees and expenses for the services of the Arbitrator.

3. Any time limits specified in the grievance procedure may in any individual case be extended by written agreement between the Company and the Union. Any grievance not answered within one day, excluding the employee's day(s) off, of its presentation to the Company in accordance with Step One, within three days excluding Saturdays, Sundays and holidays of the hearing in accordance with the Second Step, or within 10 days of the hearing in the Third Step, shall be deemed to have been answered in the negative at the end of that time.

4. The Union may designate a Union Grievance Committee Chairman and not more than nine Union Grievance Committeemen. The Union shall at all times in writing keep the Company advised of their names. After notice to and permission from his immediate supervisor in the department, the Chairman of the Union Grievance Committee will be afforded such time off as may be required (a) to attend a meeting with the Company representatives in the Second or Third Step of the grievance procedure or (b) after notice to and permission from the designated supervisor in a department other than his department to investigate a grievance in that department.

After notice to and permission from his immediate supervisor in his department, a Union Grievance Committeeman will be afforded such time off as may be required (a) to attend a meeting with the Company representatives in the First Step, Second Step, or the Third Step

of the Grievance procedure or (b) to investigate a grievance in his department, (c) after notice to and permission from the designated supervisor in a department other than his department and in the area for which he is Union Grievance Committeeman, to investigate a grievance in that department.

Such permission shall, subject to the necessity of orderly and uninterrupted operation, not be unreasonably withheld.

The Company shall pay the Chairman of the Union Grievance Committee and a Union Grievance Committeeman for time lost while investigating and meeting with Company representatives in the plant in Steps One, Two, or Three of the grievance procedures.

* * *

ARTICLE XXIV
DURATION

1. The Company and the Union each agree that the other shall not be obligated to bargain collectively during the term of this Agreement concerning any matter referred to or covered in this Agreement.

2. This Agreement shall continue in full force and effect through August 31, 1993 and shall be considered automatically renewed from year to year thereafter unless at least sixty (60) days prior to the end of any affective period either party shall serve written notice on the other that it desires modification or termination of this Agreement. If any modification is thus proposed, the parties

shall negotiate the same, and attempt to reach an agreement with respect to the proposed change or changes.

In the Matter of the Arbitration	)	
Between	)	FMCS No. 90-23015
AMAX METALS RECOVERY, INC.	)	Issue: Paid Lunch Period
and	)	OPINION AND AWARD
UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 8373	)	

Statement of the Case

In this grievance, dated February 5, 1990, the Union asserts that the Company unilaterally changed a practice of providing a paid lunch period to employees in the Material Handling Department (MHD) when they are required to work ten or more hours in a day.

By way of background, some employees in the plant work a continuous operation schedule with a paid meal period. Other employees, such as the 18 bargaining unit members in the MHD, normally are scheduled on regular shifts of 8½ hours which include a 30 minute unpaid lunch period. Prior to June 1986, the Company occasionally granted a paid lunch period to regular shift employees who worked more than ten hours in a day. This occurred only when management preferred that employees work the overtime without taking another meal period. In these instances, employees who had taken their 30 minute unpaid lunch period on their regular shift were paid for that time.

In June 1986, Joel Fiegenschue, a MHD employee and local union official, suggested to Bill McClure, the supervisor for Feed Preparation, Material Handling and Chrome Reduction, that MHD employees receive a paid lunch period whenever they work ten or more successive hours in a day and do not take a second meal break on overtime. They discussed these terms, and the Union further agreed that MHD employees would eat their second meal "on the run" during the overtime period, as opposed to being given the option of taking a contractuially [*sic*] provided meal break for employees working ten hours in a day.

In late 1989, Roland Des Roches, the Industrial Relations Manager, learned of the payments to MHD employees coincident to his investigation of a different matter. On January 29, 1990, the Company informed the MHD employees that payment for the lunch period was being discontinued as a cost saving effort. It further informed the employees that they could elect to take a meal break after completion of their regular shift and before beginning the overtime work.

Based upon its analysis of the MHD time sheets from June 1986 through January 1991, the Union contends that for 3½ years the MHD employees were paid in accordance with the terms of an agreement between Feigenschue and McClure which additionally ripened into a past practice.* The Union's research of the time

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* Fiegenschue testified that during the last week in August 1987, the Company did not pay the 30 minute meal period to MHD employees; however, after a grievance asserting unilateral rescission of the agreement, the matter was resolved and

sheets reflects that 2,944 lunch periods were paid to employees who worked ten or more hours in a day, and approximately 67 lunch periods (31 of which occurred during the last week in August 1987) were not paid. Fiegenschue testified that in his opinion the remaining 36 unpaid lunch periods resulted from employees [*sic*] failing to claim the 30 minutes on their time sheets because the overtime had been assigned after the time sheets had been filled out. The Company's analysis reveals that 1,228 regular shift meal periods were paid to MHD employees who worked two or more overtime hours in addition to their regular shift. Conflicting testimony was adduced regarding payment for the lunch period. Company witnesses testified that payments are routinely made when employees on 8½ hour shifts work through their lunch period regardless of the number of hours they work in the day. Union witnesses testified that they have not worked through their lunch period and received payment for it when they have not worked at least two hours [*sic*] overtime.

The issues presented by this grievance are: Whether a past practice is enforceable under the parties' Agreement; and if so, whether a past practice was established with regard to paying MHD employees for their regular unpaid lunch period when they worked ten or more hours in a day.

The relevant Agreement provisions are as follows:

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the practice reaffirmed at Step 1 of the grievance procedure. McClure testified that he does not recall any such grievance or discussion.

ARTICLE IV
MANAGEMENT RIGHTS

The management and operation of the plant and direction of the working force, including but not limited to the right to hire, promote, transfer, demote, layoff and discipline employees for proper cause, shall be vested exclusively in the Company, and the Company shall have all the rights it would have had were this Agreement not in effect; provided that any exercise of these rights expressly restricted by the provisions of this Agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement.

ARTICLE VII
GRIEVANCE PROCEDURE

Fourth Step. . . . The Arbitrator shall interpret and apply the express provisions of this Agreement to the facts of the particular grievance involved, and shall have no power to add to, modify or amend any part of this Agreement.

ARTICLE X
OVERTIME AND OTHER PAY PROVISIONS

9. An employee who is required to work ten (10) successive hours will be furnished a meal or lunch or the Company will, if the employee prefers, pay such employee a four dollar ($4.00) allowance in lieu of a meal. An additional meal lunch, or four dollar ($4.00) allowance will be offered to such employee who continues to work up to four (4) additional successive hours and for each four (4) additional successive hours thereafter.

Des Roches, who has been a member of management's bargaining team in every contract negotiations [*sic*], testified that the term "past practices" arose in the 1975 contract negotiations for the parties' initial Agreement. He explained that management had proposed the wording of the management rights and Step Four provisions, which the Union accepted and which has not been changed in the succeeding negotiations. He further testified that management's objectives with regard to those proposals were to insure that the Company would not be bound by any past practices and that only the express contract provisions would limit the Company's reserved rights. He stated that the Union's chief negotiator initially noted the unusual nature of the Company's management rights proposal, and management responded that it wanted to avoid any obligations arising out of past practices. Des Roches testified that the Union spokesman then indicated that the Union was not interested in protecting past practices or taking away the Company's right to manage.

The Union relies on its review of the weekly time sheets for MHD employees from June 1986 through January 1990 to reflect a past practice of having paid the lunch period to employees who worked ten or more hours. It maintains that supervisors commonly enter into such agreements with Union representatives. It further points out that the Company never attempted to negotiate a change in the practice of paying for the lunch period which was well known to all MHD employees. The Union also notes that the time sheets were approved on a weekly basis by McClure or his assistant. It cites other non-contractual agreements reached between supervisors

and local union officials wherein employees were granted a paid lunch period, such as for the employees working four twelve hour shifts in the Maintenance Department and in Area 12 as well as for Maintenance Department employees working ten hour days and Lab employees.

The Company points to the Article IV language (and Des Roches' testimony) which provides that management retains all the rights it would have had if there were no contract, except to the extent it is expressly restricted by the Agreement. The Company further notes that Article VII, Section 2, Fourth Step requires the Arbitrator to adhere to the express contract provisions without adding to, modifying or amending them. It argues that there is nothing in the Agreement that requires the continuance of a practice. The Company also contends that there was no established practice in the MHD to pay employees as the Union asserts. Rather, the Company maintains, it always has paid for unworked regular shift lunch periods only if, in its judgment, it determines to do so in order to motivate employees to do a better job. It argues that the concept of a past pracitice [*sic*] is relevant only if used in interpreting a contract provision or under a contract clause requiring that practices be continued. Moreover, the Company observes, practices are binding only where the parties agree that the practice is the accepted way of doing things. Here, however, the Company says, there was no agreement, with only Fiegenschue's request to McClure to give the matter some thought. Additionally, the Company states, McClure, as a second level supervisor, did not have the authority to contractually bind the Company to a practice. Furthermore, the Company asserts, assuming that a practice existed, it would not

survive the demise of the circumstances giving rise to it; that is, MHD management stopped the payment of the unworked regular shift lunch period by allowing employees an unworked meal period during the overtime hours.

Discussion and Findings

Although this collective bargaining relationship dates back to 1975, the instant grievance appears to have triggered, for the first time, the question whether established practices are binding on the parties under the terms of their Agreement.

As the Elkouri's have observed in their renowned treatise, *How Arbitration Works*, "evidence of custom and past practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement."

In the present case, the Union asserts a past practice for the purpose of establishing a working condition on which the Agreement is silent – a paid lunch period when MHD employees work ten or more hours in a day. The Company, on the other hand, contends that because the Agreement is silent on the issue, under the unique language of Article IV, no past practice can override management's reserved rights.

I find that the Company's reliance on the language of the management rights clause is misplaced. The phrase "and the Company shall have all the rights it would have had were this Agreement not in effect" is more reasonably read as referring to the reserved rights of management pursuant to the fundamental bargain struck by the parties when the language was negotiated. Simply put, the Union relinquished its right to strike during the term of an agreement in exchange for a contract guaranteeing certain rates of pay and working conditions. At most, it would be reasonable to argue that under Article IV the Union signed away its right to claim past practices in existence prior to the effective date of the initial agreement in 1975. There is, however, no basis under the Article IV language to conclude that the Union agreed to prospectively forego the right to assert the existence of past practices arising during the term of the parties' agreement. Indeed, under accepted principles of contract interpretation, any ambiguity in language is resolved against the drafter. If the Company's objective in 1975 was to ensure that the Agreement reflected the full and final bargain of the parties with the result that future practices would not be binding, it was incumbent on management to draft a provision which clearly set forth this aim. Because the Article IV language drafted by management does not do so, and because the Step Four language is simply a commonly accepted provision establishing an arbitrator's authority, I find that the Agreement does not preclude the enforcement of past practices established during the contract term.

In light of the above finding, the following analysis reviews the relevant criteria for establishing a binding

practice and addresses the facts and circumstances surrounding the asserted past practice in this grievance.

Mutuality is the key to establishing a binding practice. In other words, the practice must be the parties' accepted way of doing things. A binding practice may be established by oral agreement or by a specific course of conduct that occurs with sufficient regularity. It must be long standing, and the employees must rely on it.

The record clearly reflects that in June 1986 McClure and Fiegenschue orally agreed to pay the lunch period to MHD employees working ten or more hours in a day. The evidence also shows that with relatively few exceptions over a 3½ year period, the agreement resulted in these payments [*sic*] having been consistently and uniformly made when MHD employees worked ten or more hours. There is no evidence indicating that management did not pay for the regular lunch period in these circumstances during the 3½ year period, other than the instances testified to by Feigenschue. The Company's assertion that many instances of payment involved employees working through their regular lunch period does not serve to rebut the Union's contention that MHD employees were consistently paid for their lunch period on the days they worked two or more hours of overtime.

I further find that McClure, as a second level supervisor with responsibility for the MHD, had the authority to enter into the agreement which established the practice. I find unpersuasive the Company's assertions during the hearing that the agreement was made in error and the practice is not consistent with the treatment given other plant employees working the normal 8½ hour shift. The

extended duration of this specific and consistent practice requires that it be recognized as a working condition for MHD employees, notwithstanding that higher levels of management may have differed with McClure's judgment.

Based on the above findings, I find that the Company's unilateral revocation of the aforementioned established practice was improper, notwithstanding management's restoration of the meal break on overtime. In this regard, I find no merit in the Company's contention that the circumstances giving rise to the practice were discontinued when management unilaterally restored the meal break on overtime. The condition giving rise to the practice was the requirement to work daily overtime. Because this condition has not changed during the period at issue, I find that the practice of paying MHD employees for their regular lunch period remains in effect.

AWARD

The grievance is sustained. All MHD employees who worked ten or more hours in a day after January 29, 1990 shall be made whole in accordance with the past practice of paying them for their unpaid lunch period, and the Company shall reinstate the practice.

/s/ Jerome H. Ross
Jerome H. Ross, Arbitrator

October 28, 1991
McLean, Virginia